

This is an appeal from the decision of the Administrative Law Judge that granted claimant's request for penalties against the respondent. The Appeals Board has jurisdiction to review this Order as this is a final Order and not a preliminary hearing order as contemplated by K.S.A. 44-534a. See Waln v. Clarkson Constr. Co., 18 Kan. App. 2d 729, 861 P.2d 1355 (1993) and Stout v. Stixon Petroleum, 17 Kan. App. 2d 195, 836 P.2d 1185, rev. denied 251 Kan. 942 (1992).

A preliminary hearing was held in this case on March 22, 1995 that resulted in a preliminary hearing Order entered by the Administrative Law Judge dated April 18, 1995 that found claimant to be temporarily totally disabled and entitled to temporary total disability benefits at the rate of two hundred sixty-eight dollars and thirty cents (\$268.30) per week from February 23, 1995. The respondent timely appealed to the Appeals Board that preliminary hearing Order.

In a letter dated April 21, 1995, and received by the respondent and its insurance carrier on April 24, 1995, the claimant made a demand pursuant to K.S.A. 44-512a for payment of the temporary total disability compensation awarded from February 23, 1995, pending the appeal before the Appeals Board. Respondent paid temporary total disability benefits beginning April 18, 1995, the date of the preliminary hearing Order, but did not pay the benefits ordered prior to that date. Claimant then filed an Application for Penalties Pursuant To K.S.A. 44-512a on May 26, 1995. In that Application, claimant requested the Administrative Law Judge to assess penalties against the respondent for the past due temporary total disability compensation benefits from February 23, 1995 to April 17, 1995.

The Application for Penalties was argued before the Administrative Law Judge on July 13, 1995. As a result of that hearing, the Administrative Law Judge, in an Order dated July 14, 1995, found that the preliminary hearing Order of April 18, 1995 should be enforced in its entirety. The Administrative Law Judge concluded that benefits awarded prior to the date of a preliminary hearing order are not stayed until a hearing is held before the Appeals Board on appeal. The Administrative Law Judge went on to find "[t]hat the sentence is ambiguous in that the phrase 'from the date' could and does apply from the date that medical compensation and temporary total disability payments were incurred, not from the date that they were awarded." The Administrative Law Judge then assessed a penalty of one hundred dollars (\$100.00) per week from April 18, 1995 forward against the respondent. The penalty on the date of the Order, July 14, 1995, totalled one thousand two hundred fifty-seven dollars (\$1,257.00), with an additional one hundred dollars (\$100.00) per week for every week the temporary total disability benefits remain unpaid. Claimant, additionally, had requested an award of attorney fees and such request was denied with the Administrative Law Judge finding that there was no authority under the penalty statute to award attorney fees.

Respondent argues that the statutory language contained in K.S.A. 44-534a stays all payments of medical and temporary total disability benefits awarded prior to the date of the preliminary hearing order. However, for benefits that are awarded after the date of the preliminary hearing order, payments are not stayed. Additionally, the pre-dated benefits are required to be paid if the preliminary hearing order is affirmed by the Appeals Board or within thirty (30) days of oral argument to the Appeals Board, whichever occurs first. In support of this argument, the respondent cites both K.S.A. 44-551(b)(2)(B) and the Appeals Board decision of Stover v. Skyline Corporation, Docket Number 163,921 (June 1995).

On the other hand, claimant agrees with the Administrative Law Judge and argues that the date medical compensation and temporary total disability compensation are incurred is controlling, not the date the preliminary hearing order is issued. Claimant further argues that any other interpretation of this sentence would render the sentence following in K.S.A. 44-534a which permits an award of temporary total compensation benefits paid from the date of filing the application and, in some instances, prior to this date, totally illogical and unneeded.

The question before the Appeals Board is the interpretation of a statute which is a question of law. Seabourn v. Coronado Area Council Boy Scouts of America, 257 Kan. 178, 891 P.2d 385 (1995); State v. Heffelman, 256 Kan. 384, 886 P.2d 823 (1994). "When a statute is plain and unambiguous the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be." Randall v. Seemann, 228 Kan. 395, Syl. ¶ 1, 613 P.2d 1376 (1980).

The sentence that is part of the preliminary hearing statute, which is the subject of this appeal, is found at K.S.A. 44-534a(a)(2) and reads as follows:

"If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award."

The Appeals Board disagrees with the Administrative Law Judge's conclusion that the language contained in the foregoing sentence is ambiguous. The Appeals Board finds that the language is clear and unambiguous. Accordingly, the intent of the legislature should be construed as plainly expressed by the language, rather than determine what it should or should not be. The word "from" as contained in the phrase "from the date of the preliminary hearing award" is a preposition which is used to indicate a particular time or place as a starting point. Webster's II New Riverside University Dictionary (1988). It is the finding of the Appeals Board that the starting point in the subject sentence is the date of the preliminary hearing order as plainly stated. The starting point is clearly expressed within the sentence of the statute and should not be interpreted, as concluded by the Administrative Law Judge, to mean the date that the medical compensation and temporary total disability compensation were incurred. Additionally, the Appeals Board finds no merit in the argument that any other interpretation of the subject sentence other than the Administrative Law Judge's interpretation would render the subsequent sentence that permits the administrative law judge to order temporary total benefits from the date of the preliminary hearing application or, in some instances, prior to that date, as totally illogical and unneeded. This sentence has absolutely nothing to do with the question of whether preliminary hearing benefits are paid during the pendency of an appeal of a preliminary hearing order. Accordingly, the Appeals Board concludes that having found that benefits awarded in a preliminary hearing order are not stayed from the date of the preliminary hearing order when appealed then, by implication, benefits awarded prior to the date of the preliminary hearing order are stayed during the pendency of such appeal.

The respondent also interpreted the Appeals Board decision of Stover v. Skyline Corporation, *supra*, as finding that preliminary hearing benefits ordered by the administrative law judge prior to the date of the preliminary hearing order were required to be paid commencing thirty-one (31) days after the date arguments were presented by the parties to the Appeals Board pursuant to K.S.A. 44-551. The Appeals Board finds that the respondent has misinterpreted Stover. The issue in Stover was whether a respondent was

required to make payments on a final award or order and not a preliminary hearing order during the pendency of an appeal to the Appeals Board. In Stover the Appeals Board found that K.S.A. 44-551 related to appeals from final awards and other final orders and the statute required payment pursuant to those final awards and other final orders commencing thirty-one (31) days after arguments were presented to the Appeals Board. However, with regard to preliminary hearing orders, the Appeals Board found that K.S.A. 44-534a specifically controlled the obligation of payment of benefits during the pendency of an appeal from a preliminary hearing order and not the provisions of K.S.A. 44-551.

With regard to the claimant's claim for attorney fees, the Appeals Board affirms the Administrative Law Judge's Order denying attorney fees in this matter.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge George R. Robertson dated July 14, 1995, which assessed penalties against the respondent pursuant to K.S.A. 44-512a should be reversed, and the portion of the Order denying attorney fees should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Norman R. Kelly, Salina, Kansas
Scott J. Mann, Hutchinson, Kansas
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director